

LATHAM & WATKINS LLP
 Steven M. Bauer (Bar No. 135067)
 steven.bauer@lw.com
 Sadik Huseny (Bar No. 224659)
 sadik.huseny@lw.com
 Amit Makker (Bar No. 280747)
 amit.makker@lw.com
 Shannon D. Lankenau (Bar No. 294263)
 shannon.lankenau@lw.com
 505 Montgomery Street, Suite 2000
 San Francisco, CA 94111
 Telephone: 415.391.0600
 Facsimile: 415.395.8095

LATHAM & WATKINS LLP
 Richard P. Bress (*pro hac vice*)
 rick.bress@lw.com
 Melissa Arbus Sherry (*pro hac vice*)
 melissa.sherry@lw.com
 Anne W. Robinson (*pro hac vice*)
 anne.robinson@lw.com
 Tyce R. Walters (*pro hac vice*)
 tyce.walters@lw.com
 Genevieve P. Hoffman (*pro hac vice*)
 genevieve.hoffman@lw.com
 Gemma Donofrio (*pro hac vice*)
 gemma.donofrio@lw.com
 555 Eleventh Street NW, Suite 1000
 Washington, D.C. 20004
 Telephone: 202.637.2200
 Facsimile: 202.637.2201

LAWYERS' COMMITTEE FOR
 CIVIL RIGHTS UNDER LAW
 Kristen Clarke (*pro hac vice* forthcoming)
 kclarke@lawyerscommittee.org
 Jon M. Greenbaum (Bar No. 166733)
 jgreenbaum@lawyerscommittee.org
 Ezra D. Rosenberg (admitted *pro hac vice*)
 erosenberg@lawyerscommittee.org
 Dorian L. Spence (*pro hac vice* forthcoming)
 dspence@lawyerscommittee.org
 Ajay P. Saini (admitted *pro hac vice*)
 asaini@lawyerscommittee.org
 Maryum Jordan (Bar No. 325447)
 mjordan@lawyerscommittee.org
 Pooja Chaudhuri (Bar No. 314847)
 pchaudhuri@lawyerscommittee.org
 1500 K Street NW, Suite 900
 Washington, D.C. 20005
 Telephone: 202.662.8600
 Facsimile: 202.783.0857

*Additional counsel and representation
 information listed in signature block*

UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

WILBUR L. ROSS, JR., et al.,

Defendants.

CASE NO. 5:20-cv-05799-LHK

**PLAINTIFFS' SUBMISSION
 REGARDING PRODUCTION OF OIG
 DOCUMENTS**

Date: TBD
 Time: TBD
 Place: Courtroom 8
 Judge: Hon. Lucy H. Koh

1 **I. INTRODUCTION**

2 Plaintiffs concur with the Court’s analysis and proposal to conduct an *in camera* review of
 3 the production Defendants provided in response to the Office of Inspector General’s (“OIG”) August
 4 13, 2020 Information Memorandum for Secretary Ross (“OIG Documents”). The Court has clear
 5 authority to order immediate production of the OIG Documents. Those documents fall squarely
 6 within the scope of the Court’s Order to Produce the Administrative Record (“AR”) (Dkt. 96) that
 7 Defendants have violated, and the Court has authority to order *in camera* review of documents
 8 withheld as privileged. Defendants have now agreed to make a full production of the OIG documents
 9 directly to the Court for *in camera* review (*see* Dkt. 122), and should submit those materials
 10 forthwith. But Defendants should not be permitted to remain in violation of this Court’s orders for
 11 all time. Nor should this replace their legal obligation to produce the complete administrative record
 12 as this Court ordered. The time constraints of this case make the OIG production an acceptable
 13 compromise production in the immediate term—for purposes of resolving the PI as expeditiously as
 14 possible. But, as discussed below, Defendants’ defiance of the Court’s order is sanctionable and
 15 they should not be permitted to use this Court’s largesse as a starting point for further negotiations.

16 **II. THE COURT HAS AMPLE AUTHORITY TO RESPOND TO DEFENDANTS’**
 17 **VIOLATION OF THE COURT’S ORDER TO PRODUCE THE**
ADMINISTRATIVE RECORD

18 During the September 14 CMC, the Court found that Defendants failed to comply with the
 19 Court’s Order to Produce the AR (Dkt. 96). In fact, as of 11:00 a.m. on September 13, Defendants
 20 conceded that they had only reviewed a fraction of the 8,800 potentially relevant documents. *See*
 21 Giacomo Decl. ¶ 11 (Dkt. 104). Defendants thus clearly violated the Court’s Order to produce all
 22 “documents comprising the Replan and its various components for conducting the 2020 Census in a
 23 shortened time period” by September 13, 2020. Dkt. 96 at 21; *see also* Dkt. 119. Furthermore,
 24 Defendants’ claims of impossibility are belied by the fact that at the August 26 CMC, the Court told
 25 Defendants that an AR should be produced—and by the fact that, with respect to the OIG materials,
 26 Defendants already had gathered, reviewed, and produced a relevant set of materials squarely in line
 27 with the Court’s ruling here.
 28

1 As this Court has noted, “a district court’s finding that one of its orders was violated ‘is
2 entitled to considerable weight’ because the district judge is ‘best equipped to assess the
3 circumstances of non-compliance.’” *Guifu Li v. A Perfect Day Franchise, Inc.*, 281 F.R.D. 373, 390
4 (N.D. Cal. 2012) (quoting *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997)). And the Court
5 has authority to address the violation here via both its inherent authority and Federal Rule of Civil
6 Procedure 37.

7 *First*, the Court has inherent authority “to fashion . . . appropriate sanction[s] for conduct
8 which abuses the judicial process” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–46 (1991) (citations
9 and internal quotation marks omitted); *see also Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct.
10 1178, 1186 (2017) (“Federal courts possess certain ‘inherent powers,’ not conferred by rule or
11 statute, to manage their own affairs so as to achieve the orderly and expeditious disposition of
12 cases.”) (internal citations and quotation marks omitted); *Primus Automotive Financial Services,*
13 *Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997) (“[t]he district court has ‘broad fact-finding
14 powers’ with respect to sanctions, and its findings warrant ‘great deference’” (internal citation
15 omitted)); *Penthouse Int’l, Ltd. v. Playboy Enters.*, 663 F.2d 371, 386 (2d Cir. 1981) (federal courts
16 “possess[] broad inherent power to protect the administration of justice by levying sanctions in
17 response to abusive litigation practices.”) This extends to the issuance of orders to redress
18 inappropriate conduct when “foot-dragging” results in plaintiffs not getting records relevant to their
19 claims in the case. *Penthouse*, 663 F.2d at 392; *Residential Funding Corp. v. DeGeorge Fin. Corp.*,
20 306 F.3d 99, 106-07 (2d Cir. 2002) (courts may use their inherent authority to “impose sanctions on
21 a party for misconduct in discovery.”); *Malone v. U.S. Postal Service*, 833 F.2d 128, 130 (9th Cir.
22 1987) (district courts may impose sanctions for failing to comply with a court order).

23 *Second*, Rule 37(b)(2) authorizes additional orders or sanctions against a party that fails to
24 comply with a discovery order, and applies to the government’s failure to produce the AR in an APA
25 case. Rule 37(b)(2) provides in relevant part that “[i]f a party . . . fails to obey an order to provide
26 or permit discovery . . . , the court where the action is pending may issue a broad swath of further
27 orders or sanctions.” Fed. R. Civ. P. 37(b)(2)(A). Indeed, a district court has “wide discretion” in
28 fashioning sanctions under Rule 37. *Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 975

(9th Cir. 2017). Under Federal Rule of Civil Procedure 37, this Court and other courts have entered sanctions where a party's "production is incomplete, in violation of [the] Court's order." *Guifu Li*, 281 F.R.D. at 391; *see also Logtale, Ltd. v. IKOR, Inc.*, No. C-11-5452, 2015 WL 581513, at *1, *4 (N.D. Cal. Feb. 11, 2015). Failure to produce or complete an administrative record can be the basis for Rule 37 sanctions. *See Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 26 (1st Cir. 2006); *New York v. Dep't of Commerce*, No. 18-CV-2921, 2020 WL 2564933 (S.D.N.Y. May 21, 2020). As Judge Furman stated in *Dep't of Commerce*, in granting sanctions against defendants for failing to produce an adequate administrative record: "Provided that there is a clearly articulated order of the court requiring specified discovery, the district court has the authority to impose Rule 37(b) sanctions for noncompliance with that order." *Id.* at *8 (quoting *Daval Steel Prods.*, 951 F.2d 1357, 1363 (2d Cir. 1991)).

Given "Defendant's failure to comply with the Court's order on September 13, 2020," the Court has the authority to enter sanctions against Defendants pursuant to Rule 37.¹ Order Re: Production of Inspector General Documents (Dkt. 119) at 2.

III. ALLOWING A MORE LIMITED *IN CAMERA* PRODUCTION IS AN APPROPRIATE IMMEDIATE-TERM COMPROMISE BUT DOES NOT EXCUSE DEFENDANTS' NON-COMPLIANCE

To be clear, Plaintiffs are not asking this Court to sanction Defendants for their non-compliance at this time. But the fact that this Court has authority to sanction Defendants for their non-compliance certainly suggests that it has authority to propose a compromise production that inures entirely to Defendants' benefit. Plaintiffs fully appreciate and agree with the Court's willingness to move this case forward by suggesting a short-term solution. To mitigate the claimed burdens Defendants articulated at the case management conference, the Court volunteered to allow them to focus on the OIG Documents, assert privilege over the entire production, and review those documents *in camera*. The Court also agreed to allow Defendants to expeditiously object to any finding that certain documents were not privileged. And the Court agreed not to rely on any

¹ It bears noting that a party's willfulness in disobeying the court order is not a prerequisite to Rule 37 sanctions; incompetence suffices equally well. *See Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1067-68 (2d Cir. 1979) (professional incompetence sanctionable as well as deliberate intransigence).

1 privileged documents in deciding the PI motion. These were significant accommodations to
 2 Defendants. Although Plaintiffs expect that the OIG Documents do not encompass the complete
 3 AR, Plaintiffs agree that the OIG production the Court proposes is an appropriate path forward at
 4 this time.

5 Plaintiffs cannot, however, agree to Defendants' condition that such production satisfies all
 6 of their obligations to produce the complete AR in this case for all time. *See* Dkt. 122 at 1:11-15.
 7 Defendants cannot refuse to comply with the Court's order regarding production, and then offer to
 8 "fix" their defiance if the Court gives them something in return. Plaintiffs reserve their right to seek
 9 the complete AR from Defendants in the normal course of this case—and any other sanctions or
 10 orders as appropriate—for Defendants' failure to meet their production and Court-ordered
 11 obligations to date. But, for now, the Court should proceed as planned and order immediate
 12 production of the OIG Documents for *in camera* review.

13 Finally, it is worth reiterating that Court's proposed *in camera* review is more than
 14 appropriate in these circumstances. As stated in Plaintiffs' Response to Order re: Briefing and
 15 Deadline Production (Dkt. 111), district courts in the Ninth Circuit regularly exercise their discretion
 16 to conduct *in camera* review when assessing privilege in an AR context, and courts may even
 17 conduct such review when a privilege log with a declaration from an agency official *is* properly
 18 produced. *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. C-06-4884, 2007
 19 WL 3049869, at *6 (N.D. Cal. Oct. 18, 2007).

20 During the CMC, Defendants represented that compliance with the Court's Order to Produce
 21 the AR "would not be physically feasible and would be an impossibility." Dkt. 119 at 2. And based
 22 on the inadequacy of Defendants' privilege log for the portion of the AR they have produced thus
 23 far, it appears Defendants will not be able to produce an AR and a privilege log for all privileged
 24 documents as required by the Court. Dkt. 96 at 21. In light of Defendants' deficient September 13
 25 Production and representations regarding the deficiency of future productions, the Court can
 26 certainly exercise its discretion to conduct *in camera* review. *See, e.g., In re United States*, 875 F.3d
 27 1200, 1210 (9th Cir. 2017) (district courts may conduct *in camera* review of assertedly privileged
 28 materials); *Karnoski v. Trump*, No. C17-1297, 2020 WL 4747847, at *4 (W.D. Wash. Aug. 17, 2020)

(describing discovery procedure where documents outside of decisional timeframe would be presumptively not covered by deliberative process privilege, but adopting proposal to allow Government to submit documents for *in camera* review without motion practice); *Bergeron v. Dep't of Justice-Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 3:13-cv-00625, 2015 WL 3935032 (D. Nev. June 26, 2015) (reviewing withheld document *in camera* in the absence of any privilege log or affidavit); *see also Smith v Rogers*, No. 3:15-cv-264, 2017 WL 2937957, at *1 (W.D. Penn. July 10, 2017) (describing order of withheld document provided for *in camera* review despite prior unspecific claims of privilege).

Dated: September 14, 2020

LATHAM & WATKINS LLP

By: /s/ Sadik Huseny
Sadik Huseny

Steven M. Bauer (Bar No. 135067)
steven.bauer@lw.com
Sadik Huseny (Bar No. 224659)
sadik.huseny@lw.com
Amit Makker (Bar No. 280747)
amit.makker@lw.com
Shannon D. Lankenau (Bar. No. 294263)
shannon.lankenau@lw.com
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Telephone: 415.391.0600
Facsimile: 415.395.8095

Richard P. Bress (admitted *pro hac vice*)
rick.bress@lw.com
Melissa Arbus Sherry (admitted *pro hac vice*)
melissa.sherry@lw.com
Anne W. Robinson (admitted *pro hac vice*)
anne.robinson@lw.com
Tyce R. Walters (admitted *pro hac vice*)
tyce.walters@lw.com
Genevieve P. Hoffman (admitted *pro hac vice*)
genevieve.hoffman@lw.com
Gemma Donofrio (admitted *pro hac vice*)
gemma.donofrio@lw.com
LATHAM & WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, D.C. 20004
Telephone: 202.637.2200
Facsimile: 202.637.2201

Attorneys for Plaintiffs National Urban League; League of Women Voters; Black Alliance for Just Immigration; Harris County, Texas; King County, Washington; City of San Jose, California; Rodney Ellis; Adrian Garcia; and the NAACP

Dated: September 14, 2020

By: /s/ Jon M. Greenbaum
 Kristen Clarke (*pro hac vice* forthcoming)
 kclarke@lawyerscommittee.org
 Jon M. Greenbaum (Bar No. 166733)
 jgreenbaum@lawyerscommittee.org
 Ezra D. Rosenberg (admitted *pro hac vice*)
 erosenberg@lawyerscommittee.org
 Dorian L. Spence (*pro hac vice* forthcoming)
 dspence@lawyerscommittee.org
 Maryum Jordan (*pro hac vice* forthcoming)
 mjordan@lawyerscommittee.org
 Ajay Saini (admitted *pro hac vice*)
 asaini@lawyerscommittee.org
 Pooja Chaudhuri (Bar No. 314847)
 pchaudhuri@lawyerscommittee.org
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
 1500 K Street NW, Suite 900
 Washington, DC 20005
 Telephone: 202.662.8600
 Facsimile: 202.783.0857

Attorneys for Plaintiffs National Urban League; City of San Jose, California; Harris County, Texas; League of Women Voters; King County, Washington; Black Alliance for Just Immigration; Rodney Ellis; Adrian Garcia; the NAACP; and Navajo Nation

Wendy R. Weiser (admitted *pro hac vice*)
 weiserw@brennan.law.nyu.edu
 Thomas P. Wolf (admitted *pro hac vice*)
 wolf@brennan.law.nyu.edu
 Kelly M. Percival (admitted *pro hac vice*)
 percivalk@brennan.law.nyu.edu
BRENNAN CENTER FOR JUSTICE
 120 Broadway, Suite 1750
 New York, NY 10271
 Telephone: 646.292.8310
 Facsimile: 212.463.7308

Attorneys for Plaintiffs National Urban League; City of San Jose, California; Harris County, Texas; League of Women Voters; King County, Washington; Black Alliance for Just

Immigration; Rodney Ellis; Adrian Garcia; the NAACP; and Navajo Nation

Mark Rosenbaum (Bar No. 59940)
mrosenbaum@publiccounsel.org
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, California 90005
Telephone: 213.385.2977
Facsimile: 213.385.9089

Attorneys for Plaintiff City of San Jose

Doreen McPaul, Attorney General
dmcpaul@nndoj.org
Jason Searle (*pro hac vice* forthcoming)
jasearle@nndoj.org
NAVAJO NATION DEPARTMENT OF JUSTICE
P.O. Box 2010
Window Rock, AZ 86515
Telephone: (928) 871-6345

Attorneys for Navajo Nation

Dated: September 14, 2020

By: /s/ Rafey S. Balabanian
Rafey S. Balabanian (Bar No. 315962)
rbalabanian@edelson.com
Lily E. Hough (Bar No. 315277)
lthough@edelson.com
EDELSON P.C.
123 Townsend Street, Suite 100
San Francisco, CA 94107
Telephone: 415.212.9300
Facsimile: 415.373.9435

Rebecca Hirsch (*pro hac vice* forthcoming)
rebecca.hirsch2@cityofchicago.org
CORPORATION COUNSEL FOR THE CITY OF CHICAGO
Mark A. Flessner
Stephen J. Kane
121 N. LaSalle Street, Room 600
Chicago, IL 60602
Telephone: (312) 744-8143
Facsimile: (312) 744-5185

Attorneys for Plaintiff City of Chicago

ATTESTATION

I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

Dated: September 14, 2020

LATHAM & WATKINS LLP

By: /s/ Sadik Huseny
Sadik Huseny